(3)

No. 89-407

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

PHILLIP PAUL WEIDNER,
Petitioner,
vs.
STATE OF ALASKA,
Respondent.

RESPONSE OF THE STATE OF ALASKA TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

DOUGLAS B. BAILY
ATTORNEY GENERAL OF THE
STATE OF ALASKA

By: Cynthia M. Hora
Assistant Attorney General
Office of Special Prosecutions and Appeals
1031 W. 4th Ave., Suite 318
Anchorage, AK 99501-5593
(907) 279-7424

25

QUESTIONS PRESENTED

1. Under the Alaska Statutes governing the jurisdiction of appellate courts, an attorney sanctioned in a criminal case appeals the sanctions to the Alaska court of appeals, while an attorney sanctioned in a civil case appeals the sanctions to the Alaska supreme court. Does this statutory scheme violate equal protection or due process?

2. Can a judge impose sanctions on an attorney representing a criminal defendant upon finding that the attorney did not have a good faith basis for asking a question of a witness?

3. Does the judge's decision to sanction an attorney during trial create a conflict of interest between the attorney and his client?

4. Is an attorney entitled to a jury trial on whether he violated court orders and/or rules when the maximum penalty for each violation is $500?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Federal Statutes

Court Rules

JURISDICTION

Weidner seeks discretionary review of four issues: (1) whether Alaska's statutory scheme regarding appellate jurisdiction violates equal protection and due process; (2) whether a judge can sanction an attorney who does not have a good faith basis for asking a question of a witness in open court; (3) whether the judge's decision to sanction Weidner during trial created a conflict of interest between Weidner and his client; and (4) whether Weidner was entitled to a jury trial. Weidner has properly invoked this Court's jurisdiction under 28 U.S.C. § 1257 with respect to issues (1) and (2). With respect to issues (3) and (4), it does not appear that Weidner presented these issues as federal questions in the state courts. This will be discussed more fully in the Argument section of the State of Alaska's response.

STATEMENT OF THE CASE

A. Introduction

This case arises out of the imposition of monetary sanctions by Alaska Superior Court Judge J. Justin Ripley against Anchorage attorney Phillip Paul Weidner for violations of court rules and orders which occurred during the three-month murder trial of Donald Stumpf. [1] Weidner violated court orders and rules on at least twenty-five separate occasions; Judge Ripley imposed monetary sanctions for fourteen of the violations. The sanctions, which varied in amount from $100 to $500, totalled $4650. The first violation for which a sanction was imposed was treated as direct criminal contempt under Alaska Statute 09.50.010(5). The remaining sanctions were imposed under Alaska Civil Rule

---

[1] Stumpf's conviction was affirmed by that Alaska court of appeals. *Stumpf v. State*, 749 P.2d 880 (Alaska App. 1988). This Court denied Stumpf's petition for certiorari on May 15, 1989. See *Stumpf v. State of Alaska*, No. 88-6719.

95(b), which provides that a court may fine an attorney up to $500 for violating a court rule or order.

B. The Fourteen Violations of Court Orders and Rules

Weidner first violated a court order on the day jury selection began; he stood up when the jury panel came in, after being told by Judge Ripley that everyone was to remain seated whenever the jurors entered or left the court room. The second violation occurred the next day when Weidner asked a prospective juror a question which Judge Ripley had already told Weidner he could not ask. Judge Ripley was reluctant to impose monetary sanctions so early in the trial, choosing instead to admonish Weidner to abide by court rules and orders in the future.

Weidner continued to flagrantly violate court orders in spite of this and subsequent admonitions. He referred to bad acts of witnesses in violation of a pretrial order requiring the parties to make application to the court, outside the presence of the jury, before referring to prior misconduct of a witness; he also asked questions which Judge Ripley had ruled could not be

asked. The eighth time Judge Ripley found that Weidner had violated an order, the judge stated that he would consider imposing a sanction for that particular violation at the end of trial. Judge Ripley further warned Weidner that future violations would be dealt with at the time Weidner committed the violations. This warning was repeated after Weidner was found to have violated orders on three more occasions.

These warnings and admonitions were ineffective in deterring Weidner, and Judge Ripley decided to impose monetary sanctions for fourteen subsequent violations. These violations fell into five basic categories: (a) failing to abide by a pretrial order requiring Weidner to make application to the court, outside the presence of the jury, prior to referring to bad acts of witnesses [5 violations]; (b) failing to abide by evidentiary rulings by referring to evidence which had been ruled inadmissible [5 violations]; (c) asking questions for which he did not have a good faith basis [2 violations]; (d) failing to comply with Judge Ripley's repeated orders to cease cumulative examination of witnesses [1 violation]; and (e) asking a question designed solely to embarrass and harass a witness [1 violation].

The same procedure was followed for 13 of the violations. Shortly after Weidner violated a court order or rule, the prosecutor would ask Judge Ripley to sanction Weidner. Weidner would request a jury trial, and Judge Ripley would deny Weidner's request because the maximum penalty that could be imposed was $500. Then Judge Ripley would require an immediate explanation. On some occasions Weidner would give an explanation; on others, he would not. Judge Ripley would then make findings as to whether a rule or order was violated. If a violation was found, the judge would determine an appropriate monetary sanction.

Judge Ripley deviated from this procedure on one occasion. In that instance, the judge granted Weidner's request for an opportunity to consult with counsel before responding to the allegation.

C. The Appeals

Weidner appealed the fourteen sanctions in a single, consolidated appeal to the Alaska court of appeals. The court of appeals affirmed eleven of the fourteen sanctions (totalling $3950), and remanded for

further proceedings on the other three (totalling $700). *Weidner v. State*, 764 P.2d 717 (Alaska App. 1988).

Weidner petitioned the Alaska supreme court to review the decision of the court of appeals. The Alaska supreme court denied review, and Weidner has now petitioned this Court for a writ of certiorari to the Alaska court of appeals for review of its decision.

REASONS FOR DENYING THE WRIT

I. ALASKA'S STATUTORY SCHEME FOR APPELLATE REVIEW DOES NOT VIOLATE EQUAL PROTECTION OR DUE PROCESS

The Alaska court of appeals has appellate jurisdiction over criminal prosecutions and other criminal-related matters, such as extradition, bail and post-conviction relief. AS 22.07.020. A party can seek discretionary review of a final order of the court of appeals by filing a petition for hearing in the Alaska supreme court. AS 22.05.010(d), AS 22.07.030. On the other hand, civil litigants whose cases commence in the superior court file their appeals directly with the supreme court. AS 22.05.010(b). Under this statutory scheme, an attorney sanctioned in a criminal case has his appeal heard by the court of appeals, while an attorney sanctioned in a civil case commenced in the superior court has his appeal heard by the supreme court. Because Weidner's sanctions were imposed in a criminal case, his appeal was heard by the court of appeals. This statutory scheme does not deny Weidner equal protection or due process under the Fourteenth Amendment to the United States Constitution.

In evaluating an equal protection challenge to legislation, a court must first determine whether the legislation involves suspect classifications or fundamental rights. Where fundamental rights or suspect classification are at issue, the legislation is subject to "strict scrutiny" and the state must show a compelling governmental interest. *See Shapiro v. Thompson*, 394 U.S. 618 (1969). If fundamental rights or suspect classifications are not involved, the legislation is upheld if the classifications drawn by the statute are rationally related to a legitimate state interest. *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

Weidner asserts that Alaska's statutory scheme regarding appellate jurisdiction is subject to strict scrutiny because he has a fundamental right to practice law under the United States Constitution. Weidner's position is in conflict with this Court's decision in *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232, 239 (1957), which applied the rational relationship test to regulations imposed on the legal profession. *See also Matter of Roberts*, 682 F.2d 105, 108 n.3 (3rd Cir. 1982), and *Younger v. Colorado State Board of Law Examiners*, 625 F.2d 372, 377 n.3 (10th Cir. 1980), which

both held that a person does not have a fundamental right to practice law.

The Alaska court of appeals correctly applied the rational relationship test to the statutory scheme involving appellate jurisdiction and concluded that the legislation did not violate equal protection. The civil/criminal distinction was a valid one for the Alaska legislature to draw. The legislature created the court of appeals in 1980 to deal with criminal and related matters because of a need for specialized expertise in that tribunal. The area of criminal law had expanded and become more complex in the 20 years since Alaska's judiciary was created.

The court of appeals's ruling -- that the Constitution allows a state to establish a separate court to handle all aspects of criminal prosecutions -- is consistent with decisions of this Court dealing with equal protection challenges to jurisdictional statutes. In *Missouri v. Lewis*, 101 U.S. 22, 30 (1879), this Court stated equal protection "is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision[.]" Thus, a provision under which residents of certain counties appeal to a

court of appeals, while residents of other counties appeal to the state supreme court, does not violate equal protection. 101 U.S. at 33. *See also Mallett v. North Carolina*, 181 U.S. 589 (1901) (no denial of equal protection where the state can appeal a decision from the superior court of the eastern district, but not from the western district); *Ocampo v. United States*, 234 U.S. 91 (1914) (no denial of equal protection where the residents of rural areas enjoy the right to a preliminary hearing while city residents do not). [2]

The jurisdiction of the appellate courts of Alaska is determined by subject matter. The civil/criminal distinction passes constitutional muster.

---

[2] Weidner suggests that a heightened level of scrutiny should apply to Alaska's statutes regarding jurisdiction of the state courts. Weidner cites no cases to support this proposition. This Court only applies "heightened scrutiny" in cases involving classifications based on sex or illegitimacy. *Kadrmas v. Dickinson Public Schools*, ___ U.S. ____, 108 S.Ct. 2481, 2487 (1988).

II. A JUDGE CAN SANCTION AN ATTORNEY FOR NOT HAVING A GOOD FAITH BASIS FOR A QUESTION

Judge Ripley sanctioned Weidner on two occasions for failing to provide a good faith basis for questions Weidner had asked on cross-examination. [3] On the first occasion, Judge Ripley found that Weidner did not have a good faith basis for asking the witness who had supplied Weidner's client with the murder weapon if the witness's attorney had told the witness that the witness wouldn't be prosecuted for hindering prosecution if the witness's trial testimony mirrored his grand jury testimony. On the second occasion, Judge Ripley found that Weidner did not have a good faith basis for asking the victim's widow about consulting with an attorney regarding a divorce from the victim. On both of these occasions, the judge gave Weidner the

---

[3] Weidner is simply wrong when he asserts that "most" of the contempt citations were for his failure to provide a good faith basis for his questions. Only two of the fourteen sanctions involved findings that Weidner did not have a good faith basis for asking the questions he did.

opportunity to disclose the good faith basis for the question, but Weidner refused.

Sanctioning Weidner for not having a good faith basis for asking questions was proper. It is unethical for an attorney to "state or allude to any matter that he had no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence". See Alaska Disciplinary Rule 7-106(C)(1).

Further, requesting disclosure of Weidner's good faith basis did not violate his client's privilege against self-incrimination. A criminal defendant may be required to give pretrial notice of his intent to rely on an alibi defense. He may also be required to disclose the names and addresses of his alibi witnesses prior to trial. This disclosure does not violate the privilege against self-incrimination. *Williams v. Florida*, 399 U.S. 78, 83 (1970).

Disclosure of the names of witnesses who could provide admissible evidence to support the factual predicate of counsel's questions, like disclosure of the names and addresses of alibi witnesses, does not violate the Fifth Amendment.

III. THIS COURT DOES NOT HAVE JURISDICTION TO CONSIDER THE REMAINING TWO ISSUES

In his petition for writ of certiorari, Weidner asks this Court to decide whether sanctioning an attorney during trial creates a conflict of interest, thereby denying the client effective assistance of counsel. At no time in the state courts did Weidner make this argument. Before the Alaska supreme court, the issue was framed as a violation of the client's privilege against self-incrimination. (App. at pp. 40-41) There was no discussion about a potential conflict of interest under the Sixth Amendment. This being so, Weidner has not preserved any federal question and is not entitled to invoke the jurisdiction of this Court. *Webb v. Webb*, 451 U.S. 493 (1981).

With respect to the jury trial issue, Weidner did not cite any clause of the federal constitution in his petition for hearing to the Alaska supreme court. All of the cases cited and relied upon by Weidner in the state courts were state court decisions. (See Appendix, pp. 45-46) Weidner's failure to frame the issue as a federal question precludes review by this Court. *Webb*, *supra*.

IV. JUDGE RIPLEY'S DECISION TO SANCTION WEIDNER DURING TRIAL DID NOT CREATE A CONFLICT OF INTEREST

In *Sacher v. United States*, 343 U.S. 1, 11 (1952), this Court held that, when contemptuous conduct occurs in court, the judge has discretion to decide whether to impose sanctions immediately or wait until the end of trial. Judge Ripley's decision to impose sanctions during trial was proper. Weidner committed numerous violations of court orders before Judge Ripley decided to impose monetary sanctions during trial. The judge had repeatedly admonished Weidner and had warned him that disciplinary action would become necessary if Weidner persisted in his flagrant violations of the court's orders and rules. At one point, Judge Ripley indicated that he would consider the imposition of monetary sanctions at the end of trial. However, when it became clear that the threat of imposing sanctions at some future time did not deter Weidner, Judge Ripley determined that it had become necessary to begin imposing sanctions during the trial to maintain order and to deter Weidner from future contemptuous conduct.

Contrary to Weidner's assertion, Judge Ripley's decision to impose sanctions during trial did not create a conflict of interest. The cases cited by Weidner in his petition -- *Glasser v. United States*, 315 U.S. 60 (1942), and *Holloway v. Arkansas*, 435 U.S. 475 (1978) -- involve the representation of multiple criminal defendants by a single attorney. They do not involve the situation in this case. Weidner has an ethical obligation to defend his client zealously. But this obligation does not include the right to flagrantly disregard court orders and rules. As this Court made clear in *Sacher*, *supra*, 343 U.S. at 13-14, an attorney cannot "equate contempt with courage".

V. WEIDNER WAS NOT ENTITLED TO A JURY TRIAL

One of the $100 sanctions was imposed under Alaska's criminal contempt statute -- AS 09.50.010(5) -- which provides for a maximum penalty of $100. The remaining thirteen sanctions were imposed pursuant to Alaska Civil Rule 95(b), which provides for a maximum penalty of $500 per violation. This Court has held that a court can punish for criminal contempt without affording the contemnor a jury trial. *Taylor v. Hayes*, 418 U.S. 488, 495-96 (1974); *Green v. United States*, 356 U.S. 165, 183 (1958). This Court has also held that there is no right to a jury trial where the maximum punishment does not exceed $500. *Muniz v. Hoffman*, 422 U.S. 454, 477 (1975). In *Muniz*, this Court upheld the imposition of a $10,000 fine violating a temporary injunction. Since the fines for each of Weidner's fourteen violations did not exceed $500, and since the total was less than $10,000, Weidner was not entitled to a jury trial.

CONCLUSION

Weidner's petition for writ of certiorari should be denied.

Respectfully submitted this 22nd day of November, 1989.

DOUGLAS B. BAILY
ATTORNEY GENERAL

Cynthia M. Hora
By: Cynthia M. Hora
Assistant Attorney General